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No. 99-5716

In The

Supreme Court of the United States

FLOYD J. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*
NATIONAL ASSOCIATION OF
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ASSOCIATION OF FEDERAL DEFENDERS
IN SUPPORT OF PETITIONER

This brief *amici curiae* is submitted in support of Petitioner Floyd J. Carter. By letters filed with the Clerk of the Court, Petitioner and Respondents have consented

to the filing of this brief.[1]

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice, which includes preserving the integrity of the criminal justice process, ensuring the rights guaranteed

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[1] As required by Rule 37.6 of this Court, *amici curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

persons by the Fifth Amendment to the United States Constitution, and providing fair trials to persons accused of crimes.

As a result, NACDL, consistent with its mission, files this brief *amicus curiae* in support of Petitioner's claim that the Court of Appeals erred (i) in holding that bank larceny, as defined in 18 U.S.C. § 2113(b), is not a lesser included offense of bank robbery, as defined in 18 U.S.C. § 2113(a) and (ii) as a consequence, Petitioner was not entitled to a jury charge on both offenses.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The AFD is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

STATEMENT

Amici adopt Petitioner's statement of the case.

SUMMARY OF ARGUMENT

This case presents an issue of fundamental importance to the integrity of the criminal justice system: whether, as Petitioner's first Question Presented asks, bank larceny, as defined in 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery, as defined in 18 U.S.C.

§ 2113(a). The Third Circuit erred in answering that question in the negative, and in denying Petitioner's request for a jury charge on bank larceny.

By including the crime of attempted bank robbery in § 2113(a), Congress implicitly said what the Third Circuit failed to recognize, that the crime of bank robbery is one which requires a specific intent, lest a defendant be held to have attempted a crime which is unintentional.

Congress showed its intent to define bank robbery as a specific intent crime when it included bank robbery under § 2113(a) in 18 U.S.C. § 3559(a)(2)(F)(i), the section which defines "serious violent felonies". Congress created a list of offenses which constitute serious violent felonies, and included only offenses which require specific intent, going so far as to exclude involuntary manslaughter, while including manslaughter, clearly showing a desire to exclude from the list crimes which do not require specific intent.

The interpretive presumption that a *mens rea* is required in federal statutes undermines the Third Circuit's construction of the bank robbery statute, one that would classify bank robbery as a strict liability offense. The various factors that have been set forth to overcome this presumption do not support the Third Circuit's reading, and the common law definitions of robbery and larceny further the conclusion that specific intent is an element of robbery, and thus of bank robbery under § 2113(a).

The exact words test effectively set forth by the

Third Circuit sets an unworkable standard by which Congress and other legislatures should be judged when drafting statutes. Given the sheer number of criminal statutes, as well as the number of legislators involved in drafting and amending those statutes, holding that the exact words must be used time after time, ignoring the obvious intent of the drafters, would unduly burden the evolution of the law.

Lastly, the $1,000 language in the bank larceny statute does not affect the lesser included offense analysis because it only affects the level of the offense, but does not change the conduct which is sought to be prevented, specifically, the deprivation of property from its owner.

Accordingly, *amici* NACDL and AFD respectfully submit that the decision of the United States Court of Appeals for the Third Circuit should be reversed, and Petitioner's conviction should be vacated and remanded.

ARGUMENT

I. *BANK LARCENY UNDER 18 U.S.C. § 2113(b) IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY UNDER § 2113(a) BECAUSE BANK ROBBERY, LIKE BANK LARCENY, REQUIRES SPECIFIC INTENT*

In this case, as well as in the Briefs in *Mosely v. United States*, 1998 WL 290367, 389115, and 536167, and at oral argument before the Court in 1998, one of the issues that has drawn the most attention is whether bank larceny and bank robbery under 18 U.S.C. § 2113 are distinguishable, and the former not a lesser included of the latter, because bank robbery under § 2113(a) does not require specific intent, while bank larceny does.

Petitioner's Brief more than adequately addresses the history of the statute, and of the common law. In addition, though, there are other aspects of the analysis that fully support Petitioner's conclusion: that bank robbery under § 2113(a) does indeed require specific intent, and, as a result, that bank larceny under § 2113(b) is a lesser included offense.

A. Attempts Are By Definition Specific Intent Crimes

The bank robbery statute, 18 U.S.C. § 2113(a), punishes not only the actual *taking* of money from a bank by force, but also punishes "attempts" to do so. Historically, attempts are specific intent crimes. In order to sustain its burden of proof for the crime of attempt the *Federal Jury Practice & Instructions § 21.03: The Essential*

Elements of the Offense Charged, states that the government is required to prove "the defendant intended to commit the crime ..., and ... did an act constituting a substantial step towards the commission of that crime."

As the court explained in *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976), "the classical elements of an attempt are intent to commit a crime, the execution of an overt act in furtherance of the intention, and a failure to consummate the crime." Indeed, one cannot accidentally attempt a crime, but instead must actually intend their acts to be criminal in nature. *See United States v. Rosa*, 11 F.3d 315 (2d Cir. 1993)(in order to establish that person is guilty of an attempt, government must prove defendant possessed intent to commit the offense and engaged in conduct amounting to a substantial step towards its commission); *United States v. Jenkins*, 943 F.2d 167 (2d. Cir. 1991)(crime of attempt is an inchoate offense that provides means of punishing individuals who have sufficiently manifested their intent to commit a particular substantive offense, yet have failed to consummate it).

Thus, since 18 U.S.C. § 2113(a) includes "attempts" among its prohibited activities – without establishing a separate intent provision – the intent required under the section must be *specific* intent. Otherwise, the inconsistency would create the perverse result of making *attempted* bank larceny, under § 2113(b), a lesser included offense of *attempted* bank robbery, under § 2113(a), yet leaving the *substantive* crimes separate and distinct. *See Commonwealth v. Griffin*, 456 A.2d 171, 177 (Pa. Super. Ct. 1983)(logically

impossible to attempt second or third degree murder because they are unintentional crimes).

B. 18 U.S.C. § 3559, Which Defines "Serious Violent Felonies", Lists Only Specific Intent Crimes, and Includes Among Them Bank Robbery Under 18 U.S.C. § 2113(a)

Similarly, 18 U.S.C. § 3559 lists those offenses that are considered "serious violent felonies." Among them – including bank robbery under §2113(a) – are only *specific intent* crimes. In fact, the section clearly distinguishes between specific and general intent offenses, since it expressly excludes *involuntary* manslaughter, but includes manslaughter and intentional murder.

All of the offenses listed under 18 U.S.C. § 3559(a)(2)(F)(i) require specific intent. Indeed, the subsection includes the following offenses:

> murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as defined in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in

> section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses[.]

18 U.S.C. § 3559(a)(2)(F)(i).

All of the crimes listed in § 3559(a) require *mens rea*, and the inclusion of robbery among them signals plainly that robbery is a specific intent offense. That conclusion is also clear from Congress' explicit decision to *exclude* one form of an included crime (involuntary manslaughter) that does not have any *mens rea* element.

C. The Third Circuit's Construction Would Produce Anomalous Results

If this Court adopts the Third Circuit's approach to the statutory language of § 2113(a), and omits specific intent from the elements of bank robbery, the crime of bank robbery would constitute a strict liability offense, which has historically been a method of imposing liability reserved for public welfare offenses. "[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978), *citing Dennis v. United States*, 341 U.S. 494 (1951).

In *United States v. United States Gypsum Co.*, the Court went on to warn that offenses that do not contain a *mens rea* element are generally disfavored and "at least with regards to crimes having their origin in the common law, an interpretive presumption [exists] that *mens rea* is required" in federal statutes, explaining that "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an attempt requirement." *Id.* at 837-838. This Court reiterated that principle in *Liparota v. United States*, 471 U.S. 419, 433 (1985), in which this Court held that the Government must prove that a defendant knew his particular behavior violated 18 U.S.C. § 2024(b)(1) (the federal statute governing food stamp fraud, the statute in issue in *Liparota*), before he could be convicted.

More recently, in *United States v. Excitement Video*, 513 U.S. 64 (1994), this Court, in interpreting the *mens rea* requirement of a statute when it was not clear from the wording, explained that there are "presumptions that some form of scienter is to be implied in a criminal statute even if not expressed, and that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *Id.* at 69.

Moreover, it is clear that bank robbery under section 2113(a) does not qualify as a strict liability offense. In *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960), Judge (later Justice) Harry Blackmun set forth various factors which may overcome the presumption against strict liability: (1) that the statutory

crime is not derived from the common law; (2) that there is an evident legislative policy that would be undermined by a *mens rea* requirement; (3) that the standard that the statute imposes is reasonable, and a person is properly expected to adhere to it; (4) that the penalty for violation of the statute is small; and (5) "the conviction does not gravely besmirch."

Applying the above factors to the crime of bank robbery, it is clear that four of the five factors weigh overwhelmingly against strict liability for bank robbery. For example, no party to this action denies that the crime of robbery is derived directly from the common law, and were there a legislative policy that would be undermined by an intent requirement for bank robbery, that policy would logically remove *mens rea* from the *larceny* statute as well. In addition, the penalty for bank robbery – a fine as provided for by Title 18 or imprisonment of up to twenty years, or both – is not "small," and it surely "gravely besmirches the defendant." *See United States v. Excitement Video*, 513 U.S. at 70 (describing violations punishable by up to 10 years in prison as well as substantial fines as "harsh").

Indeed, the penalty for bank robbery is more severe than for bank larceny, which the government concedes requires specific intent. Thus, if the statute is read the way the Third Circuit interprets it, the person guilty of bank larceny, the one who acts with the guilty mind, faces less punishment than the person who acts without the guilty mind and is convicted of bank robbery. Assuming *arguendo* that this Court believed intent should not be read into the bank robbery statute, it defies

logic that Congress would seek to expand the class of persons who would be affected by the bank robbery statute – by removing the intent element – while at the same time expanding the punishment for the crime, potentially to a class of persons who society would not deem 'criminal'.[2]

Congress sought to punish the result of the activity, not the act itself. If the conduct which is sought to be prevented by the robbery statute were the actual "taking" of money, then the larceny statute, with its intent requirement, would undermine that objective. It is clearly not the act of taking that Congress sought to punish in § 2113, but rather the result – the deprivation of property. Because it is in fact the result of the taking, rather than the act itself, that is sought to be prevented, it is credible to deduce that the robbery statute is merely an enhanced larceny crime, one which was accomplished through violence or intimidation. Rather than include enhanced punishment for an aggravated form of larceny – larceny with the use of force – Congress criminalized robbery.

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[2] It is implausible to assert that Congress intended for an irate customer who, being dissatisfied and upset with the service he received, takes his own money off the counter of a bank, to be guilty of bank robbery under §2113(a) if the teller feels intimidated by the customer's conduct.

D. There Is Not Any Support for the "Exact Words" Test Effectively Adopted Below By the Third Circuit

Also well-briefed by the parties is whether, in order for an offense to qualify as a lesser included offense of another, their elements must be couched in the exact same language. In affirming Mr. Carter's conviction, the Third Circuit adhered to its ruling in *Mosley*, in which it effectively determined that the elements of a lesser offense must be phrased in the exact same language as the greater. *United States v. Mosley*, 126 F.3d 200, 204 (3rd Cir. 1997).

However, as this Court pointed out during oral argument in *Mosely*, "given a Federal Criminal Code with 4,000 sections, or 3,800, having been written at different periods, with different drafting styles, with different understandings of law, don't we have to try to figure out whether Congress implicitly wanted to" retain the element of specific intent in bank robbery under §2113(a)? 1998 WL 731586 at *51.

In that context, the Third Circuit has created an unworkable standard for which Congress – or any legislature – was never on notice when it drafted the various provisions of the federal criminal code. Changes in expression and language, particularly in legal definitions, is a natural aspect of the evolution of a written code. Otherwise, with anachronistic terminology, the law would be beyond understanding of the average person, and likely even the average lawyer and jurist.

In fact, the revisions of 1948 were just such an attempt to modernize the federal criminal code. The Third Circuit, in failing to recognize how terms with common meaning will appear in statutes created and/or amended at different times, has posited an impossible rule of statutory construction, and one that unfairly hurts Petitioner in this case. Congress was not aware that it needed to describe bank robbery and bank larceny in precisely the same terms in order to preserve bank robbery's specific intent requirement and their greater/lesser offense relationship, and it should not have been, since that was never the requisite standard.[3] There is not any reason to adopt it now.

E. Bank Larceny Is a Lesser Included Offense of Bank Robbery Regardless of Whether The Amount In Question Exceeds $1,000

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[3] It has always been well understood and studied by lawyers and students alike that robbery had larceny as an element. Indeed, the section on robbery in *American Jurisprudence, Second Edition* begins by saying that "[t]he actual taking and asportation of some of the victim's personal property is an essential element of robbery. *In other words, there must first be a larceny.*" 67 Am. Jur. 2d Robbery § 13 (1985)(emphasis added); *See also People v. Butler*, 65 Cal. 2d 569, 573, 421 P.2d 703, 706, 55 Cal. Rptr. 511, 514 (1967)(stating that a specific intent to steal is a necessary element of robbery and that intent to steal may be inferred when one takes the property of another, but the existence of a state of mind incompatible with an intent to steal precludes a finding of theft or robbery); *Commonwealth v. Stewart*, 547 A.2d 1189 (Pa. Super. 1988)(specific intent to deprive is required for robbery conviction).

Another issue to which attention was devoted during argument in *Mosley* was the $1,000 threshold that appears in § 2113(b)(for *felony* bank larceny), but not in § 2113(a) for bank robbery. As explained below, the $1,000 factor notwithstanding, bank larceny remains a lesser included offense of bank robbery under the statute.

The $1,000 threshold does not affect the lesser included offense analysis because the monetary value is not necessary for conviction under bank larceny, but only affects the level of the offense – felony or misdemeanor bank larceny. *See United States v. Mosley*, 126 F.3d 200, 204 n. 2. Thus, the *conduct* required for a bank larceny conviction is the same for a felony and misdemeanor bank larceny, and is also subsumed within the required conduct for bank robbery. *See generally United States v. Brennan*, 183 F.3d 139 (2d Cir. 1999); *United States v. Rodriquez-Moreno*, 526 U.S. 275 (1999)(discussing the importance of where conduct occurred for purposes of venue analysis).

Refusing to read a *mens rea* into the bank robbery statute would lead to the incongruous result of making *misdemeanor* bank larceny a lesser included offense of bank robbery, while *felony* bank larceny would not be, even though all of the conduct elements are the same. The $1,000 language merely grades the offense by the value involved, as evidenced by the Revisor's Notes to § 2113 which describes the monetary threshold in 2113(b) as the means of "*measuring the punishment by the amount involved* . . .." (Emphasis added).

Both bank robbery and bank larceny prohibit the deprivation of property, and each offense is established regardless of the amount involved. The focus of the lesser included offense analysis therefore should be on the prohibited conduct, and not monetary thresholds that determine the grade of the offense. Indeed, the other circuits that have examined this statute, §§ 2113 (a) and (b), have held that the only element that differentiates bank robbery from bank larceny is bank robbery's use of force and violence, or intimidation, in the taking. *See United States v. Walker*, 75 F.3d 178 (4th Cir. 1996), *cert. den.*, 516 U.S. 1250 (1996)(element distinguishing bank robbery and bank larceny is use of force and violence, or intimidation to complete crime); *United States v. Brittain*, 41 F.3d 1409 (10th Cir. 1994)(bank larceny is lesser included offense of bank robbery); *United States v. Carter*, 540 F.2d 753 (4th Cir. 1976)(crimes of bank robbery and bank larceny are most strikingly differentiated by element of force and violence, or intimidation which is required for conviction of bank robbery, but not bank larceny).

In addition, in cases in which the property at issue was the same, larceny has been held to be a lesser included offense of robbery. *See People v. M'Gowan*, 1837 WL 2785 (N.Y. Sup. 1837)(an acquittal for robbery bars prosecution for larceny where property involved is the same); *State v. Mikesell*, 30 N.W. 474 (Iowa 1886)(acquittal for larceny is defense to charge of robbery where same property is subject).

Consequently, § 2113(b)'s $1,000 threshold for felony bank larceny does not disturb the conclusion

that when, as here, the property at issue is the same, bank larceny under § 2113(b) is a lesser included offense of bank robbery under § 2113(a).

CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Petitioner's Brief, it is respectfully submitted that the decision of the Court of Appeals for the Third Circuit should be reversed.

Dated: 7 February 2000
New York, New York

Respectfully submitted,

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